COURT OF APPEALS
DECISION
DATED AND FILED

March 31, 2015

Diane M. Fremgen
Clerk of Court of Appeals

Appeal No. 2014AP1575-CR **Cir. Ct. No. 2012CF4311**

STATE OF WISCONSIN **IN COURT OF APPEALS**
DISTRICT I

STATE OF WISCONSIN,

PLAINTIFF-RESPONDENT,

V.

CLIFTON ROBINSON,

DEFENDANT-APPELLANT.

APPEAL from a judgment and an order of the circuit court for Milwaukee County: DENNIS P. MORONEY, Judge. *Affirmed*.

Before Kessler and Brennan, JJ., and Thomas Cane, Reserve Judge.

¶1 CANE, J. Clifton Robinson appeals from a judgment entered after a jury found him guilty of criminal damage to property and armed robbery with use of force as party to a crime. He also appeals the order denying his postconviction motion. Robinson raises six issues. First, he argues the trial court erred when it

denied his ***Batson v. Kentucky***, 476 U.S. 79 (1986) challenge made after the State struck the last remaining black juror from the panel during *voir dire*. Second, Robinson argues there is insufficient evidence to support the convictions. Third, he argues the trial court erred in not severing the criminal damage count from the armed robbery count. Fourth, he argues the trial court should have given the jury instructions on lesser-included offenses. Fifth, he argues the identification photo shown to the jury was unduly prejudicial and cumulative because it depicted Robinson "giving the bird" to the officers. Finally, Robinson argues his trial counsel gave him ineffective assistance because he did not: (1) file a motion to sever the charges; (2) object during prejudicial testimony; (3) call police detective Elisabeth Wallich to testify at trial even though she testified at his preliminary hearing that no property was taken; (4) object when the identification photo was moved into evidence; (5) ask for a lesser-included-offense instruction; and (6) object to crime scene photos entered into evidence. We reject all of Robinson's arguments and, accordingly, affirm the judgment and order.

BACKGROUND

¶2 In August 2012, at about 11 p.m., W.H. and his wife,[1] D.S., who lived in and managed an apartment building in Milwaukee, heard a commotion in the hallway.[2] W.H.'s apartment had surveillance monitors connected to cameras

[1] W.H. refers to D.S. as his "wife," "fiancée," and "girlfriend." It is not necessary to determine which status is correct in order to decide this case. For the sake of clarity, we will refer to D.S. as W.H.'s wife throughout this opinion.

[2] We have elected to refer to the victims in this opinion only by their initials based on the recently created statute, WIS. STAT. RULE 809.86 (effective July 1, 2015), which requires that victims' names not be used in briefs without good cause. Based on the newly-created statute, we will also adopt the practice in our opinion.

in the common areas of the apartment building. From the monitors, W.H. saw several women in the hallway and a man in a white t-shirt with braided hair, who was later identified as Robinson. A second man who had on a black-hooded sweatshirt also joined the group. The group was banging on the door to apartment 107 but no one answered. One of the women, who had a gun, fired it at the doorknob to try to get into the apartment. When W.H. and D.S. confronted the group and told them about the surveillance cameras, Robinson pulled the surveillance camera off the wall and the group forced their way into W.H./D.S.'s apartment. The woman with the gun, pointed it at W.H. and D.S., and struck D.S. with it. The group demanded that W.H. give them the surveillance tape. W.H. tricked the robbers and gave them a blank tape. The robbers also grabbed D.S.'s black purse and W.H.'s video game system. At some point, W.H. called the police and was able to let them into the building. When Robinson saw the police in the building, he dropped everything he was holding (the surveillance tape, D.S.'s black purse, and W.H.'s videogame system), and ran away. Officer Thomas Marcus caught Robinson and arrested him. W.H. picked up the items Robinson had dropped in the hallway and brought them back into the apartment. During the processing of the scene, the police found a bullet casing in the hallway, but never recovered the gun.

¶3 The State charged Robinson with criminal damage to property and armed robbery use of force, as party to a crime, contrary to WIS. STAT. §§ 943.01(1), 943.32(2) and 939.05 (2013-14).[3] Robinson pled not guilty and the case was tried to a jury. During *voir dire*, the State used a peremptory strike to

[3] All references to the Wisconsin Statutes are to the 2013-14 version unless otherwise noted.

remove the only black juror still on the panel. Robinson objected to the peremptory strike as illegal under ***Batson***, and the trial court held a conference on the challenge. The State explained the reason for striking the black juror:

¶4 When the trial court was providing direction to the jury, this juror:

> didn't seem to be following what you were saying and she was laughing and gesturing to the juror next to her, and it struck me at the time that she wasn't following what you were saying or that it was inappropriate what her response was; and I made a note on my card about it that she just didn't seem to be with it about what was happening in the courtroom.

The trial court found the State's explanation to be "race-neutral" and overruled Robinson's objection.

¶5 At trial, the State told the jury during opening statement that the trial court labeled the stolen property as D.S.'s "in both of the instructions, but the property we're talking about is actually belonging to both of them." The State called W.H. to testify at trial but did not call D.S. W.H. testified that the man in the white t-shirt with braids pulled the video surveillance camera off the wall and threw it on the ground, that the camera belonged to the owner of the apartment building, and that no one consented to breaking it. W.H. also testified that the man in the white t-shirt with braids and the girl with the gun forced their way into his apartment and demanded money and the surveillance tape. W.H. said he was able to sneak out to let police into the building and upon re-entering the building, he saw the man in the white t-shirt and braids standing outside his apartment with his videogame system, his wife's purse, and the surveillance tape, and when this man saw the police in the building, he dropped the stolen property and ran. W.H. testified further that the police also observed this same man holding the stolen

property outside W.H.'s apartment and saw this same man drop the property and run.

¶6 Police Officer Marcus testified at trial that when he arrived at the apartment building, he saw a man in a white t-shirt with braids. When this man saw Marcus, he took off running. Marcus chased the man down, never losing sight of him. This man was identified as Robinson. Also, during his testimony, the State asked Marcus to identify a photo taken the night of the incident. Marcus identified the man in the picture as Robinson and told the jury that the photo was "an accurate representation of the way that Mr. Robinson looked on the night of the incident" when Marcus chased and caught him. Robinson was "flipping the bird" in the photo. Robinson did not object to the photo being received, but did object to its publication on grounds of prejudice. The trial court allowed it to be published to the jury but first covered that part of the photo where Robinson was "flipping the bird."

¶7 The jury found Robinson guilty on all counts and the trial court denied his postconviction motion, which raised the same issues he now argues on appeal.

DISCUSSION

A. ***Batson*** *challenge*.

¶8 Robinson's first argument is that the State did not have a valid reason to use a peremptory strike to remove the last black juror from the panel during *voir dire* and therefore the trial court erred when it overruled his objection. ***Batson***, based on the Equal Protection Clause, "forbids the prosecutor" from striking "potential jurors solely on account of their race or on the assumption that

black jurors as a group will be unable impartially to consider the State's case against a black defendant." ***Id.***, 476 U.S. at 89.

¶9 We apply a three-step process to determine whether a prosecutor's peremptory strikes violated the Equal Protection Clause. *See* ***State v. Lamon***, 2003 WI 78, ¶27, 262 Wis. 2d 747, 664 N.W.2d 607. First, the defendant has to make a *prima facie* showing that the peremptory strike bore a discriminatory intent. ***Id.***, ¶28. If the defendant makes the showing, the State next must give a race-neutral explanation for its strike. ***Id.***, ¶29. A "neutral explanation" is a reason based on a factor *other* than the juror's race. ***Id.***, ¶30. Finally, if the State gives a race-neutral reason, the burden goes back to the defendant to convince the court that "the prosecutor purposefully discriminated or that the prosecutor's explanations were a pretext for intentional discrimination." ***Id.***, ¶32.

¶10 Whether a peremptory strike had discriminatory intent is a question of fact for the trial court and we will give great deference to the trial court's findings when the trial court had an opportunity to evaluate credibility. ***Id.***, ¶¶41-42, 45-46. We will not overturn the trial court's finding on discriminatory intent unless it was clearly erroneous. ***Id.***, ¶43.

¶11 Here, the prosecutor gave a race-neutral explanation for why he struck the last black juror: She was not paying attention—"she was laughing and gesturing to the juror next to her, and it struck me at the time that she wasn't following what you were saying or that it was inappropriate what her response was." The trial court accepted the prosecutor's reason and found he did not have any discriminatory intent. Robinson has not pointed out nor has our review revealed anything to convince us that the trial court's finding was clearly

erroneous. Because the prosecutor's reason for striking this juror was based on a race-neutral reason, there was no ***Batson*** violation.

B. *Insufficient Evidence*.

¶12 Robinson argues that there is insufficient evidence to support the convictions because there was no proof that D.S. owned the damaged surveillance camera and there was no proof that property was taken from D.S. or that she owned the property. His argument is based on the fact that D.S. was named as the victim in the criminal complaint, but she did not testify at trial. He also argues that because W.H. moved the stolen items back into the apartment, there is reasonable doubt about what items were actually taken. The trial court found the evidence sufficient to uphold both convictions. Our review on a sufficiency-of-the-evidence challenge is limited:

> [A]n appellate court may not substitute its judgment for that of the trier of fact unless the evidence, viewed most favorably to the state and the conviction, is so lacking in probative value and force that no trier of fact, acting reasonably, could have found guilt beyond a reasonable doubt.

State v. Poellinger, 153 Wis. 2d 493, 507, 451 N.W.2d 752 (1990). Applying this standard, we conclude the evidence was sufficient to uphold both convictions.

¶13 Robinson's argument is based on the fact that the criminal complaint named D.S. as the victim and it did not mention W.H. W.H. testified at trial, but D.S. did not. This argument has no merit. First, for unknown reasons, the State elected to use W.H. to prove its case instead of D.S., and as a result, moved to amend the charges to conform to the evidence presented at trial. Robinson made no objection to the motion to conform and the trial court granted it, revising the jury instructions to use W.H.'s name instead of D.S.'s. This is a common and

acceptable practice in jury trials. *See* WIS. STAT. § 971.29(2) ("At the trial, the court may allow amendment of the complaint … to conform to the proof where such amendment is not prejudicial to the defendant."); *see also* ***State v. Nicholson***, 160 Wis. 2d 803, 805, 467 N.W.2d 139 (Ct. App. 1991). Second, W.H. and D.S. were robbed, at gunpoint, in the apartment they lived in together. Robinson took property from both of them. W.H.'s and the police officer's testimony at trial supported both charges.

¶14 W.H. testified that a man with a white t-shirt and braids ripped the surveillance camera off the wall and Officer Marcus testified at trial identifying that man as Robinson. In addition, the surveillance camera tape shows Robinson ripping the camera off the wall. W.H. also testified that the man in the white t-shirt with braids, together with a woman holding a gun, forced their way into his apartment. Both demanded money and the surveillance tape from W.H. inside W.H.'s apartment. W.H. testified that the man with the white t-shirt and braids had D.S.'s purse, the tape, and his videogame system in his hands outside of W.H.'s apartment when police entered the building, and that he saw the white-shirt-with-braids man drop the property and run. The fact that W.H. picked up the stolen property and brought it back into his apartment does not change the fact that Robinson robbed W.H. in the first place. By the time W.H. moved his property, the crime had already been completed. Further, the State did not need to prove that W.H. or D.S. owned the surveillance camera. The State only needed to prove that someone *other than* Robinson owned the property he damaged. *See* WIS. STAT. § 943.01(1) (State must prove the defendant intentionally caused damage to physical property that belonged to *another person* without consent.). W.H. testified that the property owner owned the surveillance camera and Robinson did

not have consent to damage it. This evidence is more than sufficient to uphold both charges.

C. *Severance*.

¶15 Next, Robinson argues the trial court should have severed the criminal property damage charge from the armed robbery charge. He claims that trying these two crimes together was unduly prejudicial because the property damage was a "prior bad act" that should not have been presented to the jury during the armed robbery trial. The trial court rejected Robinson's claim, ruling: "There was a nexus between the two incidents, and it was basically one continuous event with the first event providing context for the second event in [D.S. and W.H.]'s apartment."

¶16 Although Robinson never filed a motion to sever, we address the merits of this argument. Generally, our "review of joinder is a two-step process." *See* ***State v. Locke***, 177 Wis. 2d 590, 596, 502 N.W.2d 891 (Ct. App. 1993). First, we review the initial joinder decision, which is a question of law that we review independently, keeping in mind that "the joinder statute is to be construed broadly in favor of the initial joinder." ***Id.*** Joinder is allowed when two or more crimes "are of the same or similar character or are based on the same act or transaction" or are "transactions connected together or constituting parts of a common scheme or plan." WIS. STAT. § 971.12(1). Here, the two crimes at issue were part of the same act or transaction. Robinson damaged the camera and then forced his way into W.H.'s apartment to demand the surveillance tape. Joinder was proper.

¶17 The second step is to determine whether the crimes should have been severed under WIS. STAT. § 971.12(3) to avoid prejudice to the defendant. ***Locke***, 177 Wis. 2d at 597. We review severance decisions under the discretionary

standard of review. *See* ***id.*** Here, the trial court properly exercised its discretion when it denied Robinson's postconviction motion alleging the charges should have been severed. As the trial court ruled, the damage to the surveillance camera and the robbery to get the tape recording from that camera were all one continuous event. Any potential prejudice to Robinson from presenting both crimes to a jury was outweighed by "the interests of the public in conducting" a single trial against Robinson for acts that were inextricably interwoven with one another. *See* ***id.*** We conclude that any motion to sever would have been properly denied by the trial court.

D. *Lesser-Included Instruction.*

¶18 Robinson next complains that the trial court failed to give any lesser-included instructions to the jury such as "theft, attempted theft, unarmed robbery or attempted armed robbery." The trial court rejected this contention finding first that Robinson never requested any lesser-included instructions and even if he had, it would have denied the request because "there is not a reasonable probability that the jury would have acquitted the defendant of armed robbery as party to a crime based on the totality of the evidence."

¶19 Robinson's request seems to suggest the trial court erred in not giving lesser-included instructions *sua sponte* without any request from the parties. We reject Robinson's suggestion. A trial court will not *sua sponte* give lesser-included instructions because the parties are the ones who can best determine the risks and benefits of requesting the instructions. *See* ***State v. Myers***, 158 Wis. 2d 356, 364, 461 N.W.2d 777 (1990).

¶20 Further, it is undisputed that Robinson never asked for any lesser-included instructions at the time of trial. Accordingly, Robinson waived his right

to raise this issue on appeal. *See* ***State v. Smith***, 170 Wis. 2d 701, 714 n.5, 490 N.W.2d 40 (Ct. App. 1992) (failure to request or object to instructions at the jury instruction conference waives the right). Nevertheless, we elect to address the merits.

¶21 Lesser-included instructions may only be given when the evidence supports the instruction. *See* ***State v. Fitzgerald***, 2000 WI App 55, ¶8, 233 Wis. 2d 584, 608 N.W.2d 391. These instructions are proper only when the evidence provides reasonable grounds for both an acquittal on the greater offense and conviction on the lesser offense. *See* ***id.***, ¶7. Our review as to whether this test is satisfied is *de novo*. *See* ***id.***

¶22 Robinson's defense theory was misidentification. He did not call any witnesses or put in any evidence to support acquittal on armed robbery and conviction on the lesser-included offenses. Instead, he argued in closing that W.H. was confused or not credible about who did what that night. Robinson did not deny being on the scene or a part of the group. Rather, he argued it was the other man—the one in the black hooded sweatshirt—who demanded the tape, not Robinson, and no evidence supports W.H.'s testimony that Robinson was holding the stolen property and dropped it when he saw the police. Robinson, however, fails to cite any evidence in the record to support a lesser-included instruction, and we are unable to locate any. What is present in the record is W.H.'s testimony that the man in the white t-shirt and braids robbed him at gunpoint and the officer's testimony that this same man was identified as Robinson. In addition, evidence in the record shows Robinson breaking the surveillance camera belonging to the property owner. Under these circumstances, there was no basis to give a lesser-included instruction.

¶23 Robinson also argues that the handgun was never found and therefore this could have supported robbery or theft instead of *armed* robbery. We disagree. The police found a bullet casing and saw damage to the apartment door consistent with the gun being fired. Further, W.H. testified that the woman with Robinson had a gun, that the gun was used to forcibly enter W.H.'s apartment and that it was used to threaten W.H. into turning over the surveillance tape. Robinson, however, did not submit any evidence disputing W.H.'s testimony or explaining away the physical evidence supporting it. Accordingly, the fact the gun was never recovered does not reduce armed robbery to a lesser-included offense.

E. *Identification Photo.*

¶24 Next, Robinson argues the trial court erred when it published the identification photo to the jury despite the fact that the trial court covered the prejudicial gesture of Robinson "flipping the bird." Robinson argues the photo was cumulative and unnecessary and should have been excluded under WIS. STAT. § 904.03 (Relevant evidence "may be excluded if its probative value is substantially outweighed by the danger of unfair prejudice, confusion of the issues, or misleading the jury, or by considerations of undue delay, waste of time, or needless presentation of cumulative evidence.").

¶25 Our review on the trial court's WIS. STAT. § 904.03 ruling is deferential. We will not reverse unless the trial court erroneously exercised its discretion. *See* ***State v. Denny***, 120 Wis. 2d 614, 626, 357 N.W.2d 12 (Ct. App. 1984). The trial court did not erroneously exercise its discretion here. The photo in question showed what Robinson was wearing and what he looked like on the night of the robbery. The picture allowed the jurors to assess whether Robinson was one of the people observed on the surveillance tapes shown during the trial

and to assess the credibility of W.H.'s testimony. Further, the photo did not cause any prejudice as it was published with Robinson's rude gesture redacted.

F. *Ineffective Assistance*.

¶26 Finally, Robinson's last argument is that his trial counsel gave him ineffective assistance. The trial court summarily rejected this claim.

¶27 Whether a defendant has been denied the right to effective assistance of counsel presents a mixed question of law and fact. ***State v. Trawitzki***, 2001 WI 77, ¶19, 244 Wis. 2d 523, 628 N.W.2d 801. The circuit court's findings of historical fact will not be disturbed unless they are clearly erroneous. ***Id.*** The ultimate determinations based upon those findings of whether counsel's performance was constitutionally deficient and prejudicial are questions of law subject to our independent review. ***Id.*** The defendants bear the burden of proving both that counsel's performance was deficient and, if so, such performance prejudiced their defense. *See* ***Strickland v. Washington***, 466 U.S. 668, 687 (1984); ***State v. Johnson***, 153 Wis. 2d 121, 127, 449 N.W.2d 845 (1990). "Counsel's conduct is constitutionally deficient if it falls below an objective standard of reasonableness." ***State v. Thiel***, 2003 WI 111, ¶19, 264 Wis. 2d 571, 665 N.W.2d 305. Defendants must overcome a strong presumption that their counsel acted reasonably within professional norms. ***Johnson***, 153 Wis. 2d at 127. Counsel's performance is not deficient if there is no objection to an issue having no merit. *See* ***State v. Wheat***, 2002 WI App 153, ¶14, 256 Wis. 2d 270, 647 N.W.2d 441. Prejudice is proven when the defendant shows that his counsel's errors were so serious that the defendant was deprived of a fair trial and reliable outcome. *See* ***Strickland***, 466 U.S. at 687.

¶28 Robinson argues that his trial counsel gave him ineffective assistance because he did not: (1) file a motion to sever the charges; (2) object during prejudicial testimony; (3) call police detective Elisabeth Wallich at trial even though she gave exculpatory testimony at his preliminary hearing; (4) object when the identification photo was moved into evidence; (5) ask for a lesser-included-offense instruction; and (6) object to crime scene photos being moved into evidence. We reject each in turn.

1. Severance.

¶29 As noted earlier in this opinion, the charges were properly joined and if a motion to sever had been filed, it would have been denied. Accordingly, Robinson's lawyer cannot be faulted for failing to file a motion that would not have been successful. *See* ***Strickland***, 466 U.S. at 687; ***State v. Cummings***, 199 Wis. 2d 721, 747 n.10, 546 N.W.2d 406 (1996).

2. Not objecting during testimony.

¶30 Robinson argues his trial lawyer should have objected to certain questions posed to W.H. and Officer Marcus because they were unduly prejudicial and leading. First, with respect to W.H., Robinson believes his lawyer should have objected when W.H. testified about the commotion in the hallway, specifically when W.H. said: "Then after they was kicking in the doors, then I noticed there was a gunshot." Robinson would have also liked objections to the following five questions: (1) "Now the male with the white shirt, just to sum it up, and the braids was the same guy that you saw in the beginning he was down with the three females while they were kicking at the apartment door of 107?" (2) "And that's the same male with the white shirt and braids that ripped the camera off the wall?" (3) "And that's the same male with white shirt and braids that came into

your apartment while the female had the gun to your head?" (4) "And again, that's the same male with the white shirt and braids that you saw standing outside of your apartment holding all of your stuff, the Play Station, your wife's or your fiancee's purse when the police came in?" and (5) "And of course then the same male with the white shirt and braids that the officer chased down the hallway?"

¶31 Robinson fails to develop this argument or explain how the failure to object prejudiced him. For that reason alone, we could reject his claim. *See* ***State v. Pettit***, 171 Wis. 2d 627, 646, 492 N.W.2d 633 (Ct. App. 1992). In addition, objecting to the listed instances would have resulted in either the trial court overruling the objection or the State re-phrasing the question. Robinson seems to be bothered by the repeated reference to the "same male with the white shirt and braids." This phraseology, however, was what W.H. used to describe the man who tore the surveillance camera off the wall and who robbed him. W.H. was not able to identify Robinson in the photo-array lineup, so he repeatedly referred to Robinson as the man in the white t-shirt with the braids. The questions Robinson wanted his lawyer to object to were not leading or improper. Rather, they were questions restating W.H.'s prior testimony using the words W.H. used to describe Robinson.

¶32 Further, we are not convinced any objection to W.H.'s testimony about the group kicking in the doors and hearing a gunshot would have been successful. W.H. was describing what happened the night of the robbery from his personal observations. We agree with the trial court that Robinson failed to show how his trial lawyer's conduct in not objecting to W.H.'s testimony or the questions asked of him caused any prejudice.

¶33 With respect to Officer Marcus, Robinson would have liked his trial lawyer to object: (1) when Marcus referred to this incident being a response to a "[s]ubject with a gun call" when Marcus testified that W.H. told him "that someone was inside with a gun"; (2) when the prosecutor asked Marcus about his plan to "clear[] the area" and "to find and neutralize any threat"; and (3) when the prosecutor asked: "[Y]our focus as you came in was possibly trying to neutralize a threat of somebody with a gun?"

¶34 Robinson argues these questions were improper because they allowed introduction of hearsay evidence and references to a gun that were unduly prejudicial. We reject this argument. Robinson fails to cite any authority to support his argument and we will not develop his argument for him. *See* ***Pettit***, 171 Wis. 2d at 646. The jury had just heard W.H. testify about the gunshot, the forced entry at gunpoint into his apartment, and the armed robbery. These questions established the context of the situation and what the police did in response to the citizen complaint. Any objections to these questions, even if they had been sustained, would not have changed the outcome of the trial. Therefore, Robinson has failed to prove prejudice. *See* ***Strickland***, 466 U.S. at 687.

3. Detective Elisabeth Wallich.

¶35 Robinson claims his trial lawyer should have called Wallich to testify at trial because at the preliminary hearing, she testified that no property was taken from D.S. Robinson refers to a single question asked during the preliminary hearing: "Was any property taken from Ms. S[.]?" to which Wallich answered "No." This question and answer, however, is taken out of context. It immediately follows a series of questions where Wallich testified that Robinson "pointed a gun at [W.H.] and demanded his money and the videotape that had been playing," and

that when the police arrived Robinson "was standing in the hallway, holding a black bag, [which was identified as D.S.'s purse] a Play Station, and the videotape." When Robinson "saw the officers, he dropped all of the property that he was carrying and fled." And then the prosecutor asked Wallich: "Could you see what Mr. Robinson did with the property that he took from Mr. H[.] and [D.S.]?" Wallich answered, "He immediately dropped it outside of their apartment door, and it was recovered by and documented by officers."

¶36 The question Robinson references immediately followed this testimony, thereby leading this court to believe that when Wallich answered "No" she meant "No" in the sense that Robinson did not get away with any of D.S.'s property because he dropped it all when he saw the police. In any event, calling Wallich to testify at trial would not have changed the outcome and therefore Robinson has failed to establish ineffective assistance of counsel on this ground.

4. Identification Photo.

¶37 Next, Robinson claims his trial counsel should have asked for a mistrial after the trial court published the identification photo of him from the night of the robbery. He says the photo was unduly prejudicial and cumulative. As we have seen earlier in this opinion, the trial court covered up the prejudicial part of this picture and it was not cumulative. There would have been no merit to asking for a mistrial as the request would have been denied. Trial counsel cannot be ineffective for failing to pursue a futile motion. *See* ***State v. Toliver***, 187 Wis. 2d 346, 360, 523 N.W.2d 113 (Ct. App. 1994).

5. Lesser-Included Instructions.

¶38 Next, Robinson argues his trial counsel was ineffective for not requesting lesser-included instructions. As we have already seen, there was no basis for any lesser-included instructions in this case and therefore, Robinson's lawyer cannot be ineffective for failing to ask for them. *See* ***id.***

6. Crime Scene Photos.

¶39 Lastly, Robinson argues his trial counsel was ineffective for not objecting to two crime scene photos that should have been excluded as prejudicial under WIS. STAT. § 904.03. One photo showed the apartment building hallway and the other is a photo showing the gun shell casing recovered in the apartment hallway. Robinson fails to develop this argument and for that reason alone, we could summarily deny it. *See* ***Pettit***, 171 Wis. 2d at 646. For the sake of completeness, however, we briefly address it.

¶40 There is no basis upon which Robinson's lawyer could have successfully excluded either photo. The first was not prejudicial in any way as it depicted the hallway where the events took place. The second showed evidence discovered by police at the crime scene and was properly used by the State to prove Robinson and his accomplices discharged a weapon in the hallway. Any objection to these photos would have been meritless and therefore, his trial lawyer was not ineffective for failing to object. *See* ***Toliver***, 187 Wis. 2d at 360.

By the Court.—Judgment and order affirmed.

Not recommended for publication in the official reports.